IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1233 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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IMTIYAZ @ ILIYAS AHMADMIYA MAHMAD SHEIKH

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Appeal No. 1233 of 1999

MR JM BUDDHBHATTI for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MS. HANSA PUNANI, APP for Respondent No. 1

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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 20/01/2003

ORAL JUDGEMENT

1. This is an appeal challenging the judgement and

conviction order recorded on 5th October, 1999 by the learned Special Judge (Narcotics Drugs and Psychotropic Substances Act, 1985 for short "NDPS Act", Bharuch) in Special (NDPS) case No. 9 of 1998 under which the learned Judge convicted the present appellant for an offence punishable under Section 20 (b)(I) of the NDPS Act, and sentenced him to suffer rigorous imprisonment for five years. The learned Trial Judge also directed the appellant to pay fine of Rs. 50,000/- (Fifty Thousand only). In default of payment of fine, the appellant was required by the said Court, to suffer further rigorous imprisonment for a period of one year.

2. The facts of the case of the prosecution may be briefly states as follows;

That PSI, Mr. J D Sutariya, of Hansot Police Station in Bharuch District, received a communication that the present appellant was dealing in business of Ganja in the house situated in Darari Falia area of Village Kharach. Thereafter, he conveyed the said information, to his immediate superior i.e. the Police Inspector. Then a raid was carried out on 07/07/98 at the said house of the appellant. The appellant was present in the house and when the search was carried out, it was noticed that Ganja weighing 700 grams was found in the kitchen of the house. Samples were collected and they were sealed. Thereafter, panchnama was drawn. FIR was filed. The appellant was arrested on the spot. Statements of witnesses were recorded. Documents were collected and at the end of the investigation, the investigating Police Officer submitted chargesheet before the said Court.

3. There it was registered as Special Case (NDPS) No. 9 of 1998. The learned Judge supplied copies of investigation papers to the appellant. Charge was prepared and framed. It was read and explained to the appellant. The appellant pleaded not guilt to the said charge and thereafter, evidence was recorded. Further statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure (for short "the Code"). Arguments were heard, and at the conclusion of the trial, the learned Judge found that the prosecution has proved the case against the appellant and therefore, after hearing the appellant on the point of quantum of punishment, the learned Judge directed the appellant to suffer the aforesaid punishment.

4. Feeling aggrieved by the said judgment and conviction of the order, the appellant has preferred this

appeal before this Court. It is mainly contended that, the Trial Court has not properly considered the provisions made in Section 50 of the said Act. It has also been contended that the Trial Court has committed error in holding that the appellant was in possession of the house in question. It has also been argued that the initial order passed by the PSI was under the Bombay Prohibitions Act and not under the said Act. It has also been contended that the provisions made in Section 42 of the said Act have not been complied with. Therefore, the offence against the appellant has not been made out and consequently it has been prayed that the present appeal may be allowed, the judgment and conviction order of the Trial Court may be set aside and the appellant may be held to be not guilt for the offence in question and consequently he may be acquitted and be set at liberty forthwith.

4. The appeal was admitted and bail was not pressed at the stage when the appeal was admitted.

5. Today when the appeal was called out for hearing, Mr. J M Buddhbhatti, has appeared on behalf of the appellant and Ms. H Punani, learned APP has appeared on behalf of the respondent - State. Both of them have argued the matter at length, and they have also taken me through the judgment and conviction order of the Trial Court and the documentary as well as oral evidence on record before the Trial Court.

6. If we go through the evidence on record, it is clear that Mr. J D Sutariya, PSI had received the aforesaid information on 07/07/98. He immediately conveyed it to his superior officer i.e. the Police Inspector and thereafter, raid was carried out by these two officers in presence of panchas. During the course of the raid, Ganja weighing 700 grams was seized from the kitchen of the said house. Sample was collected and Panchnama was drawn. The sample was sent to the Analyst for chemical analysis. It was the opinion of the Chemical Analyst that the sample was Ganja. Therefore, at the end of the investigation, chargesheet for the above offence was filed against the appellant. The PSI was cross-examined at length and nothing fruitful was derived therefrom. Therefore, the Trial Court has relied upon the said evidence of the PSI.

7. Then, there is the evidence of Panch Dipakbhai, Ex. 7. He was a panch and in his presence the house of the appellant was searched. He has also supported the case of the prosecution, and has deposed that 700 grams

of Ganja was recovered from the kitchen of the appellant. He has given details with respect to the collection of samples and with respect of the sealing process. The said evidence is supported by the evidence of panchnama, Ex. 8. Both of them clearly support the prosecution case.

8. Then we can find the evidence of Mr. S R Patel, Ex. 11. It is pertinent to note that he has got his shop opposite to the house of the appellant and he has clearly deposed that the appellant has been staying in the house in respect of which the raid was carried out. In fact, this witness was invited for weighing the muddammal articles and he has supported the case of the prosecution on that point also. His evidence, that the said house is occupied by the appellant, corroborates the case of the prosecution, about the occupation of this house by the appellant.

9. Police Head Constable, Mr. Mohanbhai Govindbhai, Ex. 12, has also supported the case of the prosecution. He was a member of the raiding party. He had called the panch witness there and had given details as to how the raid was carried out in respect of the said house of the appellant.

10. Mr. N B Patel, Ex. 14, is a photographer. He has deposed that photographs were taken by him, showing the recovery of Ganja from the kitchen of the house, occupied by the appellant. His evidence is supported by the documentary evidence produced by him.

11. Then there is the evidence of Mr. M D Patel, Ex. 20. He is a Talati-cum-Mantri and he has clearly deposed that the house in question was allotted to one another person, but the said house is being occupied by the present appellant. Therefore, his evidence with respect to the possession of the house supports the case of the prosecution.

12. Mr. R B Rana, Ex. 23, is a Deputy Mamlatdar, who has also supported the case of the prosecution. He has deposed that the Ration Card was issued in the name of the appellant, showing the aforesaid address of the appellant, which further shows that the possession of the said house was with the present appellant. His evidence is supported by the documents which he has produced during the course of his evidence.

13. Mr. Gumanbhai Maljibhai, Ex. 25, states that the appellant has been staying in the house which is

behind his own house. This further shows that the appellant is in occupation of the house in question.

14. Mr. Meljibhai Bhanabhai, Ex. 30(a), Page 102 is a person to whom the above house was allotted. He has clearly deposed that the said house was let to the appellant before 8 to 9 years, and since then the appellant has been staying there in the said house. This shows that, the appellant was the occupant of this house, even according to the witness, who is the owner of the house.

15. Mr. K D Suwera, Ex. 31, is the Police Inspector who had accompanied the PSI in the raid in question. He has also deposed in terms of the deposition of the PSI.

16. The evidence of the above witnesses and the aforesaid documentary evidence clearly go to show that the above house which was raided, was in the possession of the appellant, and Ganja in question, was seized from the said house. This clearly shows that the appellant was found in possession of Ganja and he had no pass or permit for possessing the same. Therefore, the factual aspects of the case has been properly dealt with by the Trial Court and the Trial Court was right in recording the finding of facts that the appellant was found in possession of Ganja without pass or permit.

17. In above view of the matter, it could be said that the possession of the house with the appellant was not established by the prosecution, during the course of the trial in the Trial Court.

18. Learned advocate for the appellant has drawn my attention to the provision made in Section 50 of the said Act. It has been argued by him that the Police Officer carrying on the search in respect of the house in question, did not comply with the requirements of Section 50, of the said Act. On a bare reading of Section 50 of the said Act, it is very clear that it will apply only to a personal search of an accused person. We find that the muddammal articles have not been recovered from the personal search of the appellant. This article has been recovered from the kitchen of the house, occupied by the appellant. In that view of the matter, the provision of Section 50 will not apply to the facts of ths case on hand, and consequently, noncompliance of the provisions made in Section 50 of the said Act, will not be a hurdle in the way of the conviction of the appellant.

19. It has then been argued that the PSI carried out

the search of the house occupied by the appellant, after recording an order to that effect that, there was an offence under the Bombay Prohibitions Act. There is no dispute about the same. The witness has so said before the Court and the said order has been produced on record, Ex. 35. Simply because a wrong Section of a wrong Act has been mentioned, it would not lead us to infer that no raid was carried out and it was not a raid under the said Act. It is more so, when in the said order, Ex. 35, there is a clear mention that the Raiding Officer had a reasonable belief that Ganja was illegally kept and stored in the said house. When the term "Ganja" has been stated in clear terms in the said order, Ex. 35, the mare fact that there is mention about Section 121 of the Bombay Prohibitions Act, looses its importance and therefore, the appellant cannot claim acquittal, on account of this order, Ex. 35.

20. Then there is further argument advanced by the learned advocate for the appellant that the provisions made in Section 42 have not been complied with by the Raiding Officers. It is an argument that the Officer concerned, did not convey the information to his superior Officer. Now, it is in evidence of the PSI that the information received by him was conveyed to the PI. This shows that the information received by him was conveyed to his superior Officer. Even the superior Officer i.e. the PI has supported the case of the PSI on the said aspect, and he had actually accompanied the PSI in the search, in question. Therefore, it cannot be said that the information received by the PSI was not conveyed to the superior Officer.

21. Even Mr. J D Sutariya, the Circle PI, Ex. 31, has also given evidence before the Trial Court and there he has stated that he had given written intimation to the D. S. P. I am not shown any law which requires that a superior Officer receiving an information from the Subordinate Officer, should further convey it, to his superior Officer.

22. It is also required to be seen that this witness has stated in his evidence that on completion of the process, wireless intimation was given to the D. S. P. and Dy. S. P, in his own name. This further shows that whatever process undertaken by the PSI in the presence of PI, was actually conveyed by wireless message to the D. S. P. as well as to the Dy. S. P.

23. In above view of the matter, there is no reason to believe that these Officers have not carried out the

raid in accordance with law. An attempt was made to show that two women were also staying in the house in question, and, therefore, it cannot be said that the appellant alone was in possession of the said house. Now, it is a fact that the house was let to the appellant, according to the evidence of the owner of the house. Even witnesses have stated that the house was occupied by the appellant, even though for some days in a week, the appellant may be staying elsewhere. This does not show that he was not in possession of the house in question. Simply because a woman or two, have been staying with the appellant, and simply because the appellant allowed a couple of women to stay with him, it would not mean that the possession of the house in question was not with the appellant. It is more so, when the factual aspects have been properly established by lending evidence on the point of possession, which the neighbours have also deposed, in favour of the prosecution.

24. Therefore, through oral and documentary evidence, the prosecution has established that the house in respect of which raid was carried out by the two Police Officers, was in possession of the appellant and therefore, it was a matter of necessity that the Trial Court has decided that the appellant was in possession of the house and the contraband article has been recovered from his possession. In that view of the matter, the finding of fact recorded by the Trial Court with respect to the possession of the house with the appellant and with respect to the recovery of muddammal Ganja from the possession of the appellant cannot be assailed in the matter.

25. In other words, the said finding of fact cannot be treated to be against the weight of evidence on record and it cannot be said that the Trial Court has committed error in holding that the appellant was in possession of muddammal Ganja without pass or permit. Once it is found that the Trial Court was right and justified in holding that the appellant was found in possession of Ganjan, it was further justified in holding that the appellant was accountable for the offence in question. There is no infirmity during the course of the discussion of evidence on record. There is no lacunae, factual or technical arising from the records of the case. Consequently, this Court is of the opinion that the Trial Court was perfectly justified in convicting the appellant for the offences in question. There is no merit in the present appeal and therefore it deserves to be dismisses.

26. For the foregoing reasons, this appeal is ordered to be dismisses. The judgment and conviction order of the Trial Court are confirmed.

(D. P. Buch, J)

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